LEE TECK CHEE & ANOR

v.

MERRILL LYNCH INTERNATIONAL BANK LTD

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[CIVIL SUIT NO: S2-23-51-1997]
26 FEBRUARY 1998

CIVIL PROCEDURE: *Service - Out of jurisdiction - Rules of the High Court 1980, O. 11 r. 1(1)(h) - Writ action in tort - Defamation - Libel and slander - Libel and slander of title - Whether there was publication within jurisdiction - Foreign newspapers - Internet publication - Whether cause of action arose within jurisdiction - Whether leave to serve notice of writ out of jurisdiction permissible - Non-disclosure of similar actions pending in court of another country - Whether material - Whether relevant facts must be specifically drawn to court's attention*

In their statement of claim the plaintiffs alleged that the defendant had spoken and published, in the presence of reporters from various newspapers and journals in Singapore, words and statements that were defamatory of the plaintiffs, and prayed for damages for slander or libel, damages for slander or libel of title, an injunction, a declaration and other incidental relief.

The plaintiffs then applied and obtained an *ex parte* order for the injunction against the defendant. Upon being served with the said order, the defendant proceeded to argue the *inter partes* application (encl. 11). The defendant also applied, *inter alia*, to have the writ of summons (notice of which was to be served out of jurisdiction) set aside, or alternatively, for the order of the court granting leave to issue and serve the writ to be discharged or set aside (encl. 19B).

The defendant argued that: (a) the court did not have jurisdiction over the subject matter of the plaintiffs' claim within the meaning of s. 23(1) of the Courts of Judicature Act 1964 ('the CJA'); (b) the order of the court granting leave to serve the notice of writ out of jurisdiction be set aside as the plaintiffs' claim did not fall within at least one of the limbs (a) to (l) of O. 11 r. 1(1) of the Rules of the High Court 1980 ('the RHC'); and (c) there was material non-disclosure by the plaintiffs in their affidavits filed in support of their application for leave to issue and serve the writ out of jurisdiction.

Held:

[1] The alleged defamatory words were spoken in Singapore. Hence, the publication of the alleged slander, being an essential ingredient of the tort of defamation, did not take place within the jurisdiction of this court.

[1a] The alleged libel, published in the *Straits Times* and the *Business Times*, was printed for publication and sale in Singapore. Since there was no evidence that these newspapers were permitted to be imported, sold, circulated or distributed in Malaysia within the meaning of s. 2 and s. 6(1) of the Printing Presses and Publications Act 1984 ('the PPPA'), there was no publication in Malaysia of the impugned articles in the said newspapers.

[1b] There was also no evidence that any person within the jurisdiction had accessed and read these publications on the Internet. It is not permissible to access the said publications from the Internet, given the prohibitions imposed on publishing or circulating such newspapers from Singapore under the PPPA.

[1c] Since the alleged libel was not published within the jurisdiction of this court, there was no tort committed within the jurisdiction as required by O. 11 r. 1(1)(h) of the RHC. Since publication is vital to sustain a charge of defamation and since s. 23(1)(a) of the CJA requires the cause of action to have occurred in Malaysia, the plaintiffs must show publication within the jurisdiction in order to be able to maintain this claim in Malaysia.

[1d] Words spoken over the telephone by a person in Hong Kong and heard by persons in Singapore will not constitute publication in Malaysia for the purposes of establishing that a cause of action in slander has arisen in Malaysia.

[1e] Actions for slander of title or slander of goods or malicious falsehood are in a category of their own and are distinct from actions for defamation. They are not concerned with injury to reputation. The plaintiff must prove that the words uttered were false, were published maliciously, and that he suffered special damage as a result thereof save for the exception contained in s. 6 of the Defamation Act 1957. In respect of the cause of action for slander of title, applying the same reasoning as applied in respect of the allegation of slander and libel, there could be no tort committed within the jurisdiction as required by O. 11 r. 1(1)(h) of the RHC.

[1f] It is necessary that the discretion vested with the court to grant leave to serve the notice of writ out of jurisdiction be exercised with the highest regard being given to the rules which ought to be strictly construed and applied and with the benefit of any doubt being given to the foreigners.

[1g] If any claim contained in a statement of claim does not fall within limbs (a) to (l) of O. 11 r. 1(1) of the RHC, leave to serve cannot be granted in respect of that particular claim, even if there is another claim or some other claims which may fall within the said Order. The word "committed" means that in cases of defamation, publication must have taken place within the jurisdiction. Therefore, leave to serve out of jurisdiction ought not to be given to those specific claims based on causes of action which arose outside the jurisdiction of this court.

[2] The material non-disclosure by the plaintiffs of similar suits pending in the High Court of Singapore was highly relevant because it could have affected the Deputy Registrar's discretion in allowing or disallowing the application under O. 11 of the RHC. It would also be relevant to the *forum conveniens* factor.

[2a] The mere fact that a disclosure was made in the prepared statement of claim submitted to the court during the application for leave to issue and serve the writ was insufficient to overcome the failure to disclose. It is the paramount duty of counsel to address the court on issues relevant to his case. The court is not expected to read the mind of counsel. The court is equally at liberty to hold that in the absence of due attention being drawn to relevant and pertinent facts, there has been an abandonment of such relevant and pertinent facts. It must not be a plea of a party that by juxta-positioning some relevant matters within a lengthy affidavit or statement of claim and not drawing the court's attention to such relevant matters, material to his cause, he has made a full and frank disclosure. The court's attention must specifically be drawn to such relevant facts.

[Order in terms of encl. 19B; encl. 11 dismissed.]

Cases referred to:

Bata v. Bata [1948] WN 366 ***(refd)***

Gorton v. Australian Broadcasting Corporation & Anor [1973] 22 FLR 181 ***(refd)***

Jenner v. Sun Oil Co Ltd [1952] 2 DLR 526 ***(refd)***

Siskina [1979] AC 210 ***(cit)***

Sunkyong International Inc v. Malaysian Rubber Development Corp Bhd [1992] 3 CLJ 1531 ***(refd)***

The Hagen [1908] P 189 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 23(1)
Defamation Act 1957, s. 6
Printing Presses and Publications Act 1984, ss. 2, 6(1)
Rules of the High Court 1980, O. 11 r. 1(1)(h), O. 12 r. 7

Other sources referred to:
Halsbury's Laws of England, 4th edn, para 4
Libel and Slander, Carter-Ruck, 5th edn 1987

For the plaintiffs - N Chandran (S Deepak & S Ramesh with him); M/s Adnan Sundra & Low
For the defendant - Cecil Abraham (RS Nathan with him); M/s Shearn Delamore & Co

Reported by Ling Hea Hoon

JUDGMENT

RK Nathan J:

Facts

Both the plaintiffs are businessmen and own substantial shares in Country Heights Holdings Berhad (CHH). The 1st plaintiff was also at all material times the General Manager of Mines Resort Sdn Bhd (MRS). The defendant, incorporated in the United Kingdom and having a registered office in Singapore carries on the business of private banking.

It was alleged by the plaintiffs that on or about 28 September 1997 and on or about 29 September 1997 the defendant by its spokesman or agent, one Robert Grieves, spoke and published, in the presence of reporters from various newspapers and journals, words and statements, that the plaintiffs contend, are defamatory of the plaintiffs. For the purposes of these proceedings I need not go into the details of the publication. The plaintiffs therefore prayed for:

(a) Damages for slander or libel or both in the sum of RM15 million by the 1st plaintiff and RM10 million by the 2nd plaintiff.

(b) Damages for slander or libel of title.

(c) An injunction to restrain the defendant by itself, its servants or agents or otherwise, further publishing or causing to be printed, published or distributed the defamatory words or similar words defamatory of the plaintiffs.

(d) A declaration that the defendant has no right, sole or exclusive or otherwise, to any of the shares referred to in the publications in CHH.

(e) Costs.

(f) Such other relief as the court considers fit.

The Ex Parte Application

On 4 November 1997 the 1st plaintiff obtained from me an *ex parte* order in terms of the prayer for injunction with costs.

Upon being served with the order the defendant appeared before me on the same encl. 11 (the *ex parte* application) to argue the *inter partes* application.

The Defendant's Application

In the meantime, the defendant also applied (encl. 19B) pursuant to O. 12 r. 7 of the Rules of the High Court 1980 (the RHC) and the inherent jurisdiction of the court, for the following orders:

(1) That the writ of summons, notice of which is to be served out of jurisdiction dated 31 October 1997 (the writ) be set aside.

(2) Alternatively, that the order of the court dated 21 October 1997 granting leave to issue the writ be discharged and that the issuance of the writ be set aside.

(3) Further or in the alternative, that the order of the court dated 21 October 1997 granting leave to serve the notice of writ to be served out of jurisdiction (the notice of writ) on the abovenamed defendant be set aside.

(4) Alternatively, that the service of the notice of writ on the defendant be set aside.

(5) Alternatively, that pursuant to the inherent jurisdiction of the court all further proceedings in this action be stayed with liberty to the plaintiffs to commence fresh action in the High Court of the Republic of Singapore.

(6) Further or in the alternative, that pursuant to the inherent jurisdiction of the court, all further proceedings pertaining to that part of the subject matter of this action involving the plaintiffs' claims in respect of CHH's shares referred to in the statement of claim filed in this action be stayed.

(7) Such further or other relief as the court deems necessary.

(8) That the costs of this application be provided for.

Court's Findings

I decided to hear encl. 19B first because if the defendant succeeded in that application, the basis on which the injunction rested would collapse and the application for an injunction must be refused.

Jurisdiction

The defendant submits that I do not have jurisdiction over it in respect of the subject matter of the plaintiffs' claims within the meaning of s. 23(1) of the Courts of Judicature Act 1964 (CJA).

The said s. 23(1) reads:

> 23 Civil jurisdiction – general
>
> (1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where –
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> (a) the cause of action arose;
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> (b) the defendant or one of several defendants resides or has his place of business;
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> (c) the facts on which the proceedings are based exist or are alleged to have occurred; or
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> (d) any land the ownership of which is disputed is situated,
>
> within the local jurisdiction of the court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

From a reading of the statement of claim I find that the alleged defamatory words were spoken in Singapore. Since publication of the slander being an essential ingredient of the tort of defamation I am constrained to hold that the said publication did not take place within the jurisdiction of this court.

Singapore Newspapers

In so far as the plaintiffs' claims concerning the alleged libels being published in the Straits Times and the Business Times and upon the same publications being carried over the Internet, it is my judgment that the alleged libels were published in newspapers printed for publication and for sale in Singapore. The Printing Presses and Publications Act 1984 (Act 301) s. 6(1) reads:

6.(1) The Minister may in his absolute discretion grant –

(a) to any person a permit to print and publish a newspaper in Malaysia; or

(b) to any proprietor of any newspaper in Singapore a permit allowing such newspaper to be imported, sold, circulated or distributed in Malaysia.

The definition section, s. 2 defines a newspaper as follows:

> 'newspaper' means any publication containing news, intelligence, reports of occurrences or any remarks, observations or comments, in relation to such news, intelligence or occurrences, or to any other matter of public interest, or any magazine, comic or other forms of periodical printed in any language for sale or free distribution at regular or irregular intervals, but does not include any publication published by or for the Federal or any State Government or the Government of Singapore;

In the circumstances, since no evidence has been led that the said newspapers published in Singapore were permitted to be imported, sold, circulated or distributed in Malaysia within the meaning of Act 301, I must hold that there has been no publication in Malaysia of the impugned articles in the said newspapers.

Access Over Internet

I also find that there is no evidence in the statement of claim or in the affidavits in relation to the claims involving these newspaper publications that any person within the jurisdiction accessed and read any of the said publications or the alleged defamatory words on the Internet.

In any case it is my judgement that even if there was to be such evidence, I ought to hold that it is not permissible to access the said publications as contained in the earlier mentioned two newspapers even from the Internet, given the prohibition imposed on publishing or circulating such newspapers from Singapore under the Printing Presses and Publications Act.

It is my judgment therefore that since the alleged libels were not published within the jurisdiction of this court, there is no tort committed within the jurisdiction as required by O. 11 r. 1(1)(h) of the RHC.

Order 11 r. 1(1) reads:

> Where the writ does not contain any claim for damage, loss of life or personal injury arising out of –
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> (i) a collision between ships; or
>
> (ii) the carrying out of or omission to carry out a manoeuvre in the case of one or more of two or more ships; or

(iii) non-compliance on the part of one or more of two or more ships, with the collision regulations made under section 251 of the Merchant Shipping Ordinance 1952;

service of a notice of a writ out of the jurisdiction is permissible with the leave of the court in the following cases, that is to say –

...

(h) if the action begun by the writ is founded on a tort committed within the jurisdiction;

I hold that since publication is vital to sustain a charge of defamation and since s. 23(1)(a) CJA requires the "cause of action" to have occurred in Malaysia, the plaintiffs must show publication within the jurisdiction in order to be able to maintain this claim in Malaysia. In *Gorton v. Australian Broadcasting Corporation and Anor* [1973] 22 FLR 181 the court held that in relation to a television broadcast from a studio in Canberra to all other states in Australia, the publication was held to have been where the television programme was seen or heard. In *Jenner v. Sun Oil Co Ltd* [1952] 2 DLR 526 the court held that in relation to a radio broadcast made in the USA and heard in Ontario, Canada, the publication was found to have taken place where the sound waves are heard by third persons, namely in Ontario. In *Bata v. Bata* [1948] WN 366 it was held that in relation to a circular letter written in Zurich, Switzerland, to various persons in London, England, publication was held to have taken place where the letter was read, namely, in London. Publication of a slander takes place to the persons who heard the alleged slanderous words spoken (see Carter-Ruck on *Libel and Slander* 5th Edn 1987). From reading the affidavit of the 1st plaintiff (encl. 5) affirmed on 20 October 1997 and the exhibit annexed thereto (exh. LTC3), it would seem that the words were allegedly spoken by Robert Grieves over the telephone from Hongkong and exhs. LTC1 and two indicate that the reporters to whom he spoke were apparently in Singapore. In the circumstances, I hold that words spoken over the telephone by a person in Hongkong and heard by persons in Singapore will not constitute publication in Malaysia for the purposes of establishing that the cause of action in slander arose in Malaysia.

Slander Of Title

At common law apart from action for libel and slander properly so called, an action lies for statements, oral or written, which although not defamatory, are false, made and published with actual malice towards the plaintiff and causing actual damage. Such actions include actions for slander of title, that is to say, false oral or written statements made and published with actual malice in disparagement of the plaintiff's legal or equitable title to land or goods and

causing damage. The principle extends at common law to all cases in which damage is wilfully and intentionally done by the publication, without lawful occasion or excuse, of oral or written falsehood (see *Halsbury's Laws of England* 4th Edn para 4). Whilst what constitutes slander of title is not defined in the Defamation Act 1957 (the Act) s. 6 states as follows:

> 6. Slander of title, etc.
>
> (1) In any action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage –
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> (a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form; or
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> (b) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication.
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> (2) Section 3 of this Act shall apply for the purposes of this section as it applies for the purposes of the law of libel and slander.

In other words, the common law description of a slander of title still remains. It is therefore clear that actions for, slander of title or goods or malicious falsehood are in a category of their own and are distinct from actions for defamation. An action for slander of title or goods or malicious falsehood is not concerned with injury to reputation. In an action for defamation the plaintiff must prove that the alleged defamatory words referred to him. To establish a cause of action for slander of title or goods or malicious falsehood the plaintiff must prove that the words uttered were false, were published maliciously and that he suffered special damage as a result thereof save for the exceptions contained in s. 6 of the Act.

In respect of this cause of action raised by the plaintiffs, I apply the same reasoning as I had applied in respect of the allegations of slander and libel. Therefore it is my judgment that there could be no tort committed within the jurisdiction as required by O. 11 r. 1(1)(h) of the RHC.

Leave To Serve Under Order 11

With regard to service out of jurisdiction our then Supreme Court said in *Sunkyong International Inc v. Malaysian Rubber Development Corporation Bhd* [1992] 2 MLJ 146 SC at p. 151:

> The rationale behind this prescribed method of service is of course that our courts do not exercise their judicial powers beyond their territorial limits, and further service of judicial process in a foreign country, to use the grave words of Lord Denning in *Afro Continental Nigeria Ltd v. The Meridian Shipping Co SA* ([1982] 2 Lloyd's Rep 241) is an exercise of sovereignty in that country, which can only be done with the consent of that country.

In the circumstances, it is necessary that the discretion vested with the court must be exercised with the highest regard being given to the rules which ought to be strictly construed and applied and with the benefit of any doubt, being given to the foreigners.

It was the contention of the defendant that the plaintiffs must show that the claims fall within at least one of the limbs (a) to (l) of O. 11 r. 1(1) of the RHC. I agree. If any claim contained in the statement of claim does not fall within limbs (a) to (l) of O. 11 r. 1(1), leave to serve cannot be granted in respect of that particular claim, even if there is another claim or some other claims which may fall within O. 11 r. 1(1) (see *Siskina* [1979] AC 210 at 255). I am therefore constrained to hold that the claims in respect of the slander and in respect of the libel, the publications in the Straits Times and Business Times, cannot fall within O. 11 r. 1(1)(h) because the publication could not have taken place in Malaysia. Order 11 r. 1(1)(h) is explicit. It states:

> if the action begun by the writ is founded on a tort **committed** within the jurisdiction; (emphasis added)

The word "committed" to my mind cannot but mean at least in cases of defamation, that the publication must have taken place within the jurisdiction. It is my considered judgment therefore that leave to serve out of jurisdiction ought not to be given to those specific claims based on causes of action which arose outside the jurisdiction of this court. Even if I am wrong in this I am guided by the decision in *The Hagen* [1908] P 189 at 201 where Farwell LJ said:

> ... The second point which we considered established by the cases was this, that, if on the construction of any of the sub-heads of Order XI there was any doubt, it ought to be resolved in favour of the foreigner;

Non-disclosure

The question next arises whether, assuming if the plaintiffs had prayed for a permissible claim with impermissible claims the court should set aside the whole order or only such impermissible claims not falling within O. 11. The 1st plaintiff had in his affidavits failed to disclose, (a) the existence of present proceedings in the High Court of the Republic of Singapore in which the

plaintiffs by separate actions against the same defendant seek relief that is similar to the relief claimed in this action in respect of the Country Height Berhad shares, (b) the fact that the alleged spokesman for the defendant, Robert Grieves, did not speak the alleged slanderous words referred to in this action within the jurisdiction of this court.

In my view, the material non-disclosure of the suits in Singapore is highly relevant because it could have affected the Deputy Registrar's discretion in allowing or disallowing the application under O. 11. It would also be relevant for the forum conveniens factor. In the same case *The Hagen (supra)* Farwell LJ said at p. 201:

> ... and the third is that, inasmuch as the application is made *ex parte*, full and fair disclosure is necessary, as in all *ex parte* applications, and a failure to make such full and fair disclosure would justify the court in discharging the order, even although the party might afterwards be in a position to make another application.

In the circumstances, considering the material non-disclosure I will set aside the entire order.

The 1st plaintiff's contention that the fact that there are current proceedings in Singapore and that these facts were disclosed in the prepared statement of claim submitted to the court during the application for leave to issue and serve the writ, is insufficient. The mere fact that they were stated in the prepared statement of claim is insufficient to overcome the charge of failure to disclose. It is the paramount due of counsel to address the court on issues relevant to his case. The court is not expected to read the mind of counsel. The court is equally at liberty to hold that in the absence of due attention being drawn to relevant and pertinent facts, then in such circumstances, there has been an abandonment of such relevant and pertinent facts. It must not be a plea of a party that by juxta-positioning some relevant matters within a lengthy affidavit or statement of claim and not drawing the court's attention to such relevant matters, material to his cause, he has made full and frank disclosures. The court's attention must specifically be drawn to such relevant facts.

Having read all the submissions of both counsel and all the cases cited I do not think it is necessary to consider the other arguments propounded by both parties.

I am satisfied that it is in order to grant an order in terms of prayer (1) of encl. 19B. In consequence thereof the inter partes application (encl. 11) is dismissed. Costs of both applications to the defendant.